

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

691

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,096

UNITED STATES OF AMERICA
Appellee

v.

MAURICE F. IRVING
Appellant

Appeal from a Judgment of the United States
District Court for the District of Columbia

James L. Dooley
730 Fifteenth Street, N.W.
Washington, D. C. 20005

United States Court of Appeals
for the District of Columbia Circuit

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Of Counsel:

John S. Hale

Nathan J. Paulson
CLERK

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STATEMENT OF QUESTIONS PRESENTED

1. May a prosecutor comment in his closing argument and closing rebuttal argument on appellant's failure to testify when such comment is a violation of appellant's rights under the Fifth Amendment to the Constitution?

2. May a trial court in giving an "Allen Charge" instruct a jury only that the verdict must be unanimous and fail to inform the jury that it is only their duty to decide the case if they can conscientiously do so?

3. May the trial court instruct the jury that the opinion of the majority of the jurors should be given a greater weight than the opinion of a minority of the jurors?

4. Where the jury has requested clarification of the law on aiding and abetting in relationship to burglary, may the trial court give a misleading and confusing instruction on aiding and abetting?

5. Did the Government prove that there was sufficient evidence upon which a reasonable jury could have concluded beyond a reasonable doubt that appellant aided and abetted in the commission of the count of second degree burglary?

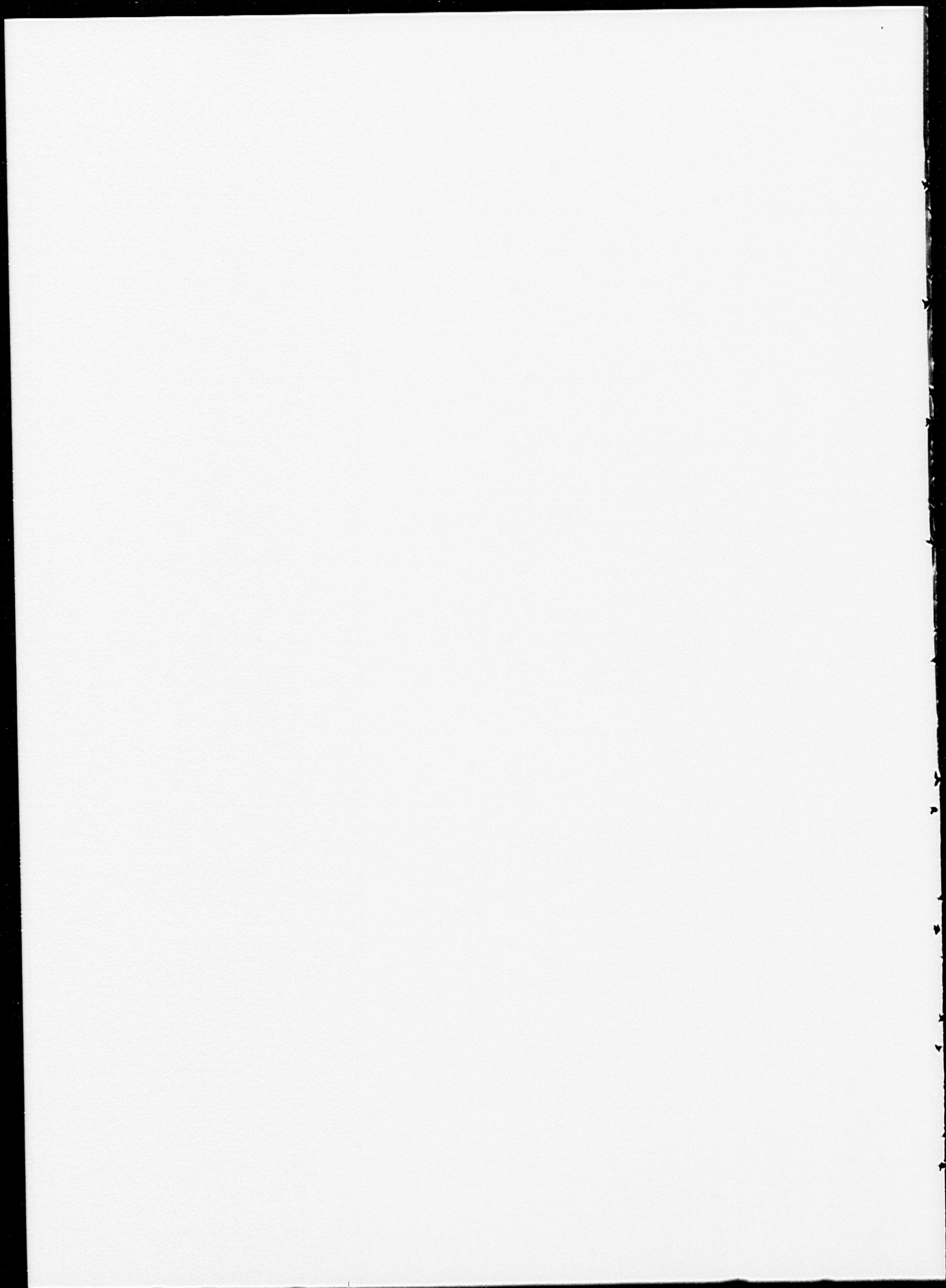
6. Did the trial court erroneously admit into evidence an inventory record purportedly linking specified

television sets with specified rooms when said record admitted was unsigned, undated and prepared by a person or persons unknown, at some unknown time, when it was not prepared by the person testifying as to its authenticity and for which no foundation for admission had been established.

REFERENCE TO RULINGS

The Court entered an oral opinion in this case (R-153) after a verdict of guilty was reached by the jury against appellant. In an order of March 11, 1969, the Court denied appellant's Motion for Judgment of Acquittal N. O. V. or, In The Alternative, For a New Trial.

This case has not been before this Court previously.



IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,096

MAURICE F. IRVING
Appellant

v.

UNITED STATES OF AMERICA
Appellee

Appeal from a Judgment of the United States
District Court for the District of Columbia

BRIEF FOR APPELLANT*

Appellant appeals from a conviction in the United States District Court for the District of Columbia of the crimes of second degree burglary (22 D. C. Code §1801(b)) and petit larceny (22 D. C. Code §2202). The jury verdict was returned on February 7, 1969, and appellant was sentenced from eighteen (18) months to seven (7) years on the second degree burglary count and one (1) year on the petit larceny count, on April 25, 1969. Leave was granted appellant to appeal in forma pauperis.

The jurisdiction of this court on appeal is founded on 28 U.S.C. §1291.

* The term "R" designates the record of the witnesses' testimony, set forth in pages 1-157. The term "RS" designates the supplemental record containing the opening statement by counsel on behalf of Government and the closing arguments by counsel in behalf of appellant and Government, set forth in pages 158-190.

STATEMENT OF THE CASE

A. Proceedings Below

A two count indictment, signed by the Foreman, was returned by the Federal Grand Jury for the District of Columbia, on September 26, 1968, charging appellant, Maurice F. Irving, and a co-defendant, with various violations of the law. The indictment alleged in counts 1 and 2 respectively that on August 24, 1968, Maurice F. Irving entered a room of Frank Perper, Harold Perper and Julian Savage partners with intent to steal property of another in violation of 22 D. C. Code §1801(b) and that on August 24, 1968, Maurice F. Irving stole property of Frank Perper, Harold Perper and Julian Savage, of the value of about \$112, consisting of a television set of the value of \$100 and a blanket of the value of \$12, in violation of 22 D. C. Code §2201.

Appellant was tried in the District Court between February 6 and February 7, 1969, and on the latter date, was found guilty and convicted. On April 25, 1969, appellant was sentenced from eighteen (18) months to seven (7) years on the first count and one (1) year on the second count to run concurrently on count one. It is from that judgment of these two convictions (R-147) that appellant takes this appeal.

B. Statement of Facts

An unidentified gentleman had a conversation with Mr. James Lesko, General Manager of the Holiday Inn Hotel, 2700 New York Avenue, N.E., Washington, D.C., at around 1:00 P.M., on August 24, 1968, and as a result of that conversation Mr. Lesko made a phone call to the police (R-55). The substance of the phone call to the police was that there was an attempt being made on some T.V.s involving a blue or gray Dodge station wagon having dealers' plates, D.X. 300 and two other numbers, and three male occupants (R-54-57, 74). After Mr. Lesko made the call he proceeded to the rear parking lot of the hotel where he observed a Dodge car with dealers' plates pulling out of the rear parking lot area (R-56). He observed three people in the automobile (R-57), which left the hotel lot onto New York Avenue.

In response to Mr. Lesko's call, the dispatcher at the police station sent out the following report: "Scout 127, Scout 127, I have a Dodge, gray in color, registration No. D.X. 300078, just left the Holiday Inn parking lot, he is going out Bladensburg Road in No. 9 precinct." (R-48). No particular individual description went out prior to the arrest (R-46). The officer, Ronald S. Dotson, was cruising in the general area of the Holiday Inn in a scout car, when he heard a radio description of an automobile that was suppose to be

involved in a breaking-in. The officer entered the parking lot of the Holiday Inn and observed a faded blue Dodge vehicle bearing D. C. temporary tags D.X. 30078 leaving the scene of the Holiday Inn where it exited at a high rate of speed from the parking lot onto New York Avenue (R-84). The officer followed the suspect automobile, operated the red light of the police car, turned on the siren and advised the police dispatcher that he was behind an automobile which fitted the description which was the one they had flashed over the radio (R-84). The officer used an outdoor microphone and advised the suspects to remain inside the car, to pull over to the curb (R-84-85). The light at which the automobile was stopped turned green and the automobile took off at a high rate of speed proceeding down Bladensburg Road. The officer gave chase and chased the suspects for approximately fifteen blocks at which time the appellant's automobile stopped and officer Dotson stopped his car behind it (R-85). After the automobile stopped the other occupants of the car fled, or tried to flee, from the officer but appellant made no attempt to run away (R-102). In the course of arresting the suspects, the officer looked into the back of the automobile, observing a television set and a gold blanket (R-89)

between the legs of co-defendant, James Irving. The television set was found to have been the property of the Holiday Inn Hotel (R-58).

Returning to Mr. Lesko; after he observed the three people in the automobile he proceeded toward Room 166. Mr. Lesko examined Room 166 of the hotel, noticed that the door was halfway open and went in. Upon entering the room he noticed that one of the blankets was missing from the bed and that a television set was missing from the room (R-57).

STATEMENT OF POINTS

1. The arbitrary emphasis of the prosecutor's remarks on appellant's constitutional right not to testify and the court's failure to grant a new trial was error.

2. The trial court's instruction to the jury that the verdict must be unanimous without informing the jury that it was only their duty to decide the case unanimously if they could conscientiously do so was plain error and deprived appellant of his right to a fair and impartial trial.

3. The trial court's instruction to the jury that

the opinion of the majority of the jurors should be given greater weight than the opinion of a minority of the jurors was plain error and deprived appellant of his right to a fair and impartial trial.

4. The instructions of the trial court on aiding and abetting in relation to the second degree burglary count was erroneous and prejudicial to appellant and deprived him of his right to a fair and impartial trial.

5. The Government failed to prove beyond a reasonable doubt that appellant aided and abetted in the commission of the burglary count of the crime.

6. The trial court erred in admitting the inventory record into evidence for the purpose of showing not only that the television set had been somewhere on the hotel premises, but also to show it was in a given room or area at the time of the alleged crimes.

SUMMARY OF ARGUMENT

1. The numerous "uncontradicted testimony" comments to the jury by the prosecutor in his closing argument constituted prejudicial error in that it brought out appellant's failure to testify thereby violating appellant's Constitutional rights under the Fifth Amendment of the Constitution.

2. It is plain error for a trial court to charge a jury that it must reach a unanimous verdict while not informing the jury that it was only their duty to so decide the case if they could conscientiously do so.

3. It is plain error for a trial court to charge a jury that a juror who finds himself opposed to the large majority of jurors should distrust his own judgment.

4. It is reversible error for a trial court to give a confusing and misleading instruction to the jury on aiding and abetting in relation to the crime of robbery when the jury specifically asks for clarification on aiding and abetting in relation to burglary.

5. The Government failed to prove beyond a reasonable doubt that appellant aided and abetted the commission of second degree burglary.

6. It was reversible error for a trial court to admit an inventory record into evidence to show that a television set was in a given room at the time of the alleged burglary, when the inventory record was undated, unsigned, not prepared by the witness and for which no foundation for admission had been established.

I. COMMENT TO THE JURY BY THE PROSECUTOR
IN HIS CLOSING ARGUMENT ON APPELLANT'S
FAILURE TO TESTIFY CONSTITUTES PLAIN
ERROR AND A VIOLATION OF APPELLANT'S
RIGHTS UNDER THE FIFTH AMENDMENT OF
THE CONSTITUTION

The pages of supplemental transcript upon which
this argument is based are pages 164-168 and 190.

Under our system of law, it is an elemental right
of an accused not to be required to testify against himself.
This right is formulated not only in the Fifth Amendment to
the Constitution¹ but also in current Federal statutory law.²

It is submitted that part and parcel of that right
is an absolute bar against a prosecutor making a comment
upon a defendant's constitutional right that he will not
testify. During the course of his closing arguments the
prosecutor breached this right six times. He opened his
closing argument, and concluded his rebuttal argument by
giving especial emphasis and importance to the fact that the
testimony of the Government's witness was uncontradicted and

1 "No person . . . shall be compelled in any criminal case
to be a witness against himself."

2 "18 U.S.C. §3481 (62 Stat. 8331 states: 'in trial of all
persons charged with the commission of offenses against
the United States and in all proceedings in Courts Martial
and courts of inquiry in any State, District, Possession
or Territory, the person charged shall, at his own request,
be a competent witness. His failure to make such a request
shall not create any presumption against him.'"

thereby pointed an accusing finger at the defendant's silence. Such comments were also repeated in various portions of the body of those arguments.

Thus the prosecutor opened his summation by stating:

"...First of all, Mr. Lesko testified, and his testimony like the testimony of the officer, ladies and gentlemen, is uncontradicted; uncontradicted testimony offered to you for your belief." (Emphasis to the transcript -- ours; emphasis in diction -- the prosecutor's) (RS 164).

And shortly thereafter stated:

"Now, his records, the record put into evidence as Government's Exhibit No. 1, a record which is kept in the course of business, a record which he told you in his uncontradicted testimony was kept accurately, that record shows the serial number of the television set was 861383." (Emphasis to the transcript -- ours; emphasis in diction -- the prosecutor's) (RS 165).

"Remember the officer's testimony that the officer -- uncontradicted testimony -- that James Irving ran a few steps before he stopped him?" (Emphasis to the transcript -- ours; emphasis in diction -- the prosecutor's) (RS 168).

These prejudicial comments were allowed to pass without objection, undoubtedly to avoid emphasizing the fact to the jury. The prosecutor, however, made an even stronger reference to appellant's not taking the stand in his rebuttal argument, where in the final paragraph of his statement to the jury he underscored his argument by taking pains to repeat:

"Ladies and gentlemen, consider the uncontradicted testimony of the Government's witness. Consider the uncontradicted testimony, and I am confident that you will

return a verdict of guilty on count 1, entering that room and stealing the television set, or taking it from someone who was a partner in entering or entering the room to get the television set and blanket, and count 2 for stealing the blanket and the television set." (Emphasis to the transcript -- ours; emphasis in diction -- the prosecutor's) (RS 190).

Such comments could only reflect on appellant's failure to take the stand. Once the comments were suddenly stated to the jury in the course of the prosecutor's final argument, the defense was put in the untenable position of making a judgment of whether greater harm would come to appellant from interrupting the prosecutor's argument to the jury and thereby focusing their attention to the fact that appellant did not testify or to remain silent and let such a prejudicial argument pass hoping that the damage done would be minimal. A prosecutor should never be allowed to force a defendant to impale himself on one horn or the other of the imposed dilemma. Garris v. United States, 390 F.2d 862 (D.C. Cir. 1968).

The end effect of prosecutor's argument with its seemingly endless repetition of the term "uncontradicted testimony" could only be to focus attention on the failure of the appellant to testify and to thus penalize him for exercising his Constitutional right not to testify.

As the Supreme Court held in Griffin v. California, 380 U.S. 609, (1965), with Mr. Justice Douglas speaking for

the court:

"...We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." (Emphasis added). 380 U.S. at 6.

In Desmond v. United States, 345 F.2d 225 (1st Cir. 1965), the prosecutor in argument to the jury said:

"These are the facts, the evidence. Incidentally, may I say to you that the evidence stands unimpeached and uncontradicted." (Emphasis added) (345 F.2d at 226).

Defense counsel objected, and the trial court stated that in its charge it would tell the jury that no inference should be drawn against the accused from his failure to take the stand. The court on appeal held that this was error which involved the infringement of a Constitutional right and granted a new trial.

The court's rationale in reaching this decision was as follows:

"Nor can we doubt that the government's statement that its witness' statement stood 'unimpeached and uncontradicted' constituted improper comment. No one but appellant (or his co-defendant, whom appellant could not put on the stand against his will) could have contradicted the government witness. (Emphasis added). 345 F.2d at 227.

" . . . Unless it is apparent on the record that there was someone other than himself whom the defendant could have called, the comment of necessity pointed to the only person who could have offered the contradiction, the defendant himself. Hence, in the present case it was clearly improper." 345 F.2d at 227.

" . . . The government made the argument because it thought it would be effective. We can think of no effect other than to invite the jury's attention to the fact the defendant had not taken the stand." 345 F.2d at 227.

The test for reversal on this question is set forth in United States v. Hart, 407 F.2d 1087 (2nd Cir. 1969) where the court, citing Desmond (Supra) with approval, states:

" . . . It is only where the Government's evidence on a material issue in dispute could be rebutted solely by defendant's testimony that it is improper for the prosecutor to characterize the Government's proof as uncontradicted." 407 F.2d at 1090.

It is readily apparent that the only one who could have contradicted Government's witnesses was the appellant or the other co-defendant.³

The error in this case was not, as may be in many cases, an innocent mistake of an inexperienced prosecutor who perhaps admonished a jury, not to make any inference from an

3 See annotation: "Comment or argument by court or counsel the prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify" 14 A.L.R. 3d 723 (1967).

accused's failure to testify, nor was it a characterization of evidence made in the course of advocacy, but rather it was a deliberate attempt to take advantage of the appellant's exercise under a Constitutional right. Here the Government was not praising its case, or referring to its compelling character but was repetitively and directly referring to appellant's failure to take the stand. Such tactics require reversal.

Prosecutor's attempts to convey defendant's not taking the stand to the jury have been condemned by the courts and held to constitute error. Examples of language used which has been found objectionable and cases which are applicable to the present case are set forth as follows:

In Wilson v. United States, 149 U.S. 60 (1893) the Supreme Court held that when a defendant did not take the stand, the following statement by the prosecutor was in error.

"...I want to say to you, that if I am ever charged with crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime, . . ." 149 U.S. at 66.

Justice Field stated that the prosecutor, in taking such an argument to the jury:

" . . .intimated to them as plainly as if he had said in so many words that it was a circumstance against the innocence of the

defendant that he did not go on the stand and testify. Nothing could have been more effective with the jury to induce them to disregard entirely the presumption of innocence to which by the law he was entitled, and which by the statute he could not lose by a failure to offer himself as a witness." 149 U.S. at 66.

In Steward v. United States, 366 U.S. 1 (1961) a case arising in this Circuit, the Supreme Court held that a question directed to a defendant testifying at a subsequent trial, as to why he failed to take the stand in a prior trial for the same offense was reversible error.

Justice Black wrote the majority opinion and in discussing the failure of a defendant to testify in his own defense stated:

"... Ordinarily, the effecuation of this protection is a relatively simple matter -- if the defendant chooses not to take the stand, no comment or argument about his failure to testify is permitted." (Emphasis added). 366 U.S. at 2.

In White v. United States, 314 F.2d 243 (D. C. Cir. 1962), the prosecutor noted to the jury that the defendant did not take the stand, in the context that it was his absolute right and it should not cause any adverse inference in the jury's deliberation. The trial court, as in the present case, subsequently instructed the jury "that no inference of guilt arises against the defendant because of his failure to testify

as a witness in his own behalf. . . ."

The Court of Appeals held that the comment of the prosecutor, even though a correct statement of the law, should have been the cause of a mistrial. See also Milton v. United States, 110 F.2d 556, 558 (D. C. Cir. 1940).

The D. C. Court of Appeals has held that comment by a prosecutor in front of the jury on the defendant's failure to testify was reversible error.

Appellant's counsel asked for instructions that defendant had a right not to testify (RS 185). The instruction which the court did give was short and perfunctory and did not correct the prejudicial comments of the prosecutor. The instruction is as follows:

"Now, I instruct you that a defendant has the absolute right not to testify and the jury may not draw a presumption of guilt or any inference against a defendant because he did not testify."
(R-126-127).

Thus, the court in one short breath gave a passing reference to the defendant's constitutional right, and quickly moved on to another topic.

In Brooks v. District of Columbia, 48 A.2d 339, (D.C. Mun. App. 1946), it was held that prejudice arising from such a prosecutorial comment was not cured by subsequent instructions to the jury:

"...The law forbids any comment being made regarding the failure of the defendant in a criminal case to take the witness stand. All prosecutors are thoroughly familiar with this rule. To say that it may be violated with impunity and the violation cured by a mere routine instruction is apt, we fear, to encourage further violations. We are unwilling to give such encouragement." (Emphasis added). (48 A.2d at 341).

Appellant does not mean to suggest that every characterization of the evidence made in the course of advocacy is to be interpreted as defendant's failure to take the stand. In a fashion every remark of counsel that evidence is clear or persuasive, is and must be, made against the tacitly known background that the defendant has not testified. Appellant does not ask that the Government is to be forbidden to plead its case or to refer to its compelling characterization, but only that the Government be forbidden to place appellant in a position where his Constitutional right not to take the stand will be brought before the jury, and repeatedly emphasized to the jury.

II. THE TRIAL COURT COMMITTED PLAIN ERROR IN CHARGING THE JURY THAT IT MUST REACH A UNANIMOUS VERDICT WHILE NOT INFORMING THE JURY THAT IT WAS ONLY THEIR DUTY TO DECIDE THE CASE IF THEY COULD CONSCIENTIOUSLY DO SO.

This argument is based on an instruction given by the trial court on page 133 of the transcript.

The trial court in this case gave a charge which was substantially different from the charge given in Allen v. United States, 164 U.S. 492 (1896), which is commonly called the "Allen Charge". The charge given by the trial court which will hereinafter be referred to as the "Irving Charge" was a main charge given to the jury and not a supplemental charge.

A side-by-side comparison of the "Allen Charge" and "Irving Charge" is set forth below.

ALLEN CHARGE

"...that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows,

yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other;

that it was their duty to decide the case if they could conscientiously do so;

that they should listen with a disposition to be convinced to each other's arguments;

that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself.

IRVING CHARGE

Now, your verdict must be the considered judgment of each juror.

In order to return a verdict it is necessary that each juror agree thereto.

Your verdict must be unanimous.

Now, although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusions of your fellows,

you should examine the question submitted with candor and with proper regard and deference to the opinions of each other.

You should listen to each other's arguments with a disposition to be convinced.

If much the larger number jurors are for conviction, a dissenting juror should consider whether his doubt is a reasonable one when it makes no impression upon the minds of so many jurors equally honest, equally intelligent with him or herself.

If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. (Emphasis added) 164 U.S. at 501.

If, on the other hand, the majority are for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of their judgment which is not concurred in by the majority. (Emphasis added) (R-133).

While a substantial body of the "Allen Charge" was incorporated in the "Irving Charge", it is readily seen that there are several major changes from the "Allen Charge". Judge Hart added to his charge "Now, your verdict must be the considered judgment of each juror. In order to return a verdict it is necessary that each juror agree thereto. Your verdict must by unanimous." (Emphasis added). He also saw fit to leave out of his charge the section from the "Allen Charge" that stated "; . . .that it was their duty to decide the case if they could conscientiously do so." (Emphasis added).

Unless the "Allen Charge" is given as the "Allen Charge" pronounced it, it has been held to be fatal error. Green v. United States, 309 F.2d 852 (5th Cir. 1962); Powell v. United States, 297 F.2d 318 (5th Cir. 1961); United States v. Rogers, 289 F.2d 433 (4th Cir. 1961).

In Moore v. United States, 345 F.2d 97 (D.C. Cir. 1965), in referring to a trial court's delivery of the so-called "Allen Charge", the court stated:

"However, since the charge is potentially coercive its content and manner of use deserve scrutiny." 345 F.2d at 98.

In Jenkins v. United States, 330 F.2d (D.C. Cir. 1964), which was later reversed by the United States Supreme Court, 380 U.S. 444 (1965), Judge Wright in his dissent stated:

" . . . At least in the Allen charge after the jury is told that it is its duty to reach a verdict, the words 'if [you] can conscientiously do so' are added. Here the jury was simply told flat out: 'You have got to reach a decision in this case'."
(Emphasis added) 330 F.2d at 222.

As is apparent, Judge Hart felt compelled to leave out the very aspect of the "Allen Charge" which Judge Wright and other courts have felt was so crucial. Powell v. United States (Supra); United States v. Rogers (Supra).

In summary, the "Irving Charge" departed in three deadly particulars from any permissible version of the "Allen Charge", assuming that said "Allen Charge" is permissible. (1) The charge was given as the main charge to a fresh, rather than a deadlocked jury. (2) The charge, although containing the coercive elements of the "Allen Charge", exceeded any permissible limits by commanding that the jury's verdict "must be unanimous". (3) The charge went beyond any permissible limits of the "Allen Charge" in that the duty of a juror to decide the case if he or she could conscientiously do so was eliminated.

III. THE TRIAL COURT COMMITTED PLAIN
ERROR IN CHARGING THE JURY THAT
A JUROR WHO FINDS HIMSELF OPPOSED
TO THE LARGE MAJORITY OF JURORS
SHOULD DISTRUST HIS OWN JUDGMENT

This argument is based on an instruction given by the trial court on page 133 of the transcript.

As previously mentioned, the "Irving Charge" differs from the "Allen Charge" even though it did contain substantial elements of the "Allen Charge". However, in this case, only two witnesses testified (and briefly at that) for the Government, the whole transcript covered only 190 pages, the trial had lasted less than a day, and the "Allen Charge" was given as part and parcel of the main charge to the jury. In the present case, there was no necessity for the "Allen Charge" at all.

The charge, if proper under any circumstances, is proper only when given to a deadlocked jury. Allen v. United States, 164 U.S. 492 (1896); Sanders v. United States, 5 Cr. L. 2427, F.2d (5th Cir. 1969). The charge, if given at all, must be given with admonitions that each individual juror should exercise his own conscience and intellect. This is fully explained in the Allen case and is suggested by "Supplemental-Instructions When Jurors Fail to Agree", 27 F.R.D. 39, 102 §8.19 (1961).

Even when the "Allen Charge" is given correctly it

has been found to be objectionable. In United States v. Fioravanti et al., ___ F.2d ___ (3rd Cir. 1969), the court held that it would not let a verdict stand which may have been influenced in any way by an "Allen Charge".

Under our present system of criminal procedure requiring a unanimous verdict in criminal cases there are three possible decisions of the jury: (1) not guilty of any charge; (2) guilty of one or more counts of the indictment; and (3) no verdict because of a lack of unanimity. This third decision of the jury commonly called a "hung" jury is just as much a part of the jury decision scheme as are verdicts of guilty or not guilty. It is also well known that a cardinal principle of the law is that a trial judge may not coerce a jury to the extent of demanding that they return a verdict.

As the Third Circuit stated in Fioravanti (Supra) to accept the reasoning of the "Allen Charge" is to assume an inherently faulty major premise which is "that the majority is right and has reached its preliminary inclination by appropriately inspired processes, and that the minority in a given group possesses attributes of spurious rationality." As the court so aptly noted; in the history of our nation "it is often a conscientious and determined minority which proves to be the safeguard against outrageous conduct wrought by tides and currents of public opinion." The following quotes set forth the court's discussion of the problems which are inherent in the "Allen Charge":

"Thus is revealed the very real treachery of the Allen Charge. It contains no admonition that the majority re-examine its position it cautions only the minority to see the error of its ways. It departs from the sole legitimate purpose of a jury to bring back a verdict based on the law and the evidence received in open court, and substitutes therefore a direction that they be influenced by some sort of Gallop Poll conducted in the deliberation room.

"All of this constitutes an unwarranted judicial invasion into the exclusive province of the jury and adds the blind imprimatur of the trial court to a matter of which it has absolutely no information: The results of the preliminary balloting in the jury room. To the product of this informal poll is added the gloss of trial judge approval.

* * * *

"Moreover, the Allen Charge serves to substitute the coercive influence of any early polling of the jury for the give and take of group deliberation, a basic attribute of the jury system often expressed as a major characteristic justifying its continuance in our judicial system.

"In reporting on psychological studies of small groups with decision-making tasks, Professor Charles W. Joiner, Dean of Wayne State University Law School, has said: 'The give-and take of group deliberation screens out errors, negates biases, and eliminates erroneous hypotheses to a far greater extent than individual deliberation. It was found that the interaction during deliberation was the crucial difference that made group decisions more just than a pooling of individuals without the give-and take of deliberation'." (Emphasis added).

as the court states, in our judicial system a:

"... unanimous jury verdict for criminal cases in the federal courts, and in all but a handful of states is eloquent testimonial that something more than a majority vote is desired. In this respect the jury system is unique. No other deliberative body in the world requires unanimity -- be it the Congress, of the United States, the College of Cardinals, the Board of Directors of our great corporations, this court of appeals, or the United States Supreme Court. The proponents of the jury system maintain that a greater degree of accuracy is guaranteed from this process of give and take which is invariably essential to reaching unanimity.

"In addition to the unsettling effect which a strategically inserted Allen Charge might have on the constitutional requirement of unanimity, its effect on the necessity for proof beyond a reasonable doubt makes it doubly circumspect. The presumption of innocence protects the defendant until such time as the prosecutor convinces the jury beyond a reasonable doubt that the defendant has committed the crime for which he stands accused."

The question of unanimity has been discussed in this circuit in Billeci v. United States, 184 F.2d 394, (D.C. Cir. 1950), in the following manner:

"An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only one of them fixedly has a reasonable doubt, a verdict of guilty cannot be returned." (Emphasis added) (184 F.2d at 403).

In Green v. United States, 309 F.2d 852 (5th Cir. 1962), the court held that there was small if any justifica-

tion for the use of the "Allen Charge". The court found that there was no justification for its coercive use but that an outer limit of its permissible use would be to remind the jurors that they should listen with a disposition to be convinced to each other's arguments.

A case to demise the charge has also been made in Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962), (dissenting opinion); Andrews v. United States, 309 F.2d 127, 129 (5th Cir. 1962) (dissenting opinion); State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959); State v. Voeckell, 69 Ariz. 145, 210 P.2d 972 (1949) (dissenting opinion).

Articles and publications which criticize the "Allen Charge" are 5 Wharton's Criminal Law Procedure §2116 (Anderson Ed. 1957); Bowers, The Judicial Discretion of Trial Courts, 337 (1931); Orfield, Criminal Procedure From Arrest to Appeal, 467-568 (1947); Note - Instructions by the Trial Court Coercing Agreement Among Jurors, 34 Tul. L. Rev. 214 (1959).

The "Allen Charge" presents a question in that the court is instructing the jury in a manner which is interrogation of defendant's traditional right of trial by jury and as such is a constitutional violation in that a defendant is being denied due process of law.

The most constructive thing which can be said about the "Allen Charge" is that which was recently said:

"...[t]he advisory committee has concluded that the Allen charge should not be used." Tentative draft, American Bar Association, Project on Minimum Standards for Criminal

Justice; Standards Relating to Trial by Jury, page 156 (May 1968).

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GIVING A CONFUSING AND MIS-LEADING INSTRUCTION TO THE JURY ON AIDING AND ABETTING IN RELATION TO BURGLARY.

This argument is based on an instruction given by the trial court on page 144 of the transcript.

The jury submitted a request to the Court to clarify aiding and abetting as far as burglary was concerned (R-140). The Court restated its previous instructions on this issue (R-140-142), and in response to a request by counsel asking the Court to give an example in which another person present might be found not guilty or would not be found guilty (R-143-144), gave the following hypothetical examples:

"Let's say A and B are friends, walking down the street or riding around the streets, and B says to A, 'Would you please take me by the bank at such and such a place, I want to cash a check, and will you wait for me outside.'

"And A says, 'Fine, I'll take you.' So A takes him, and B goes in and robs the bank. Of course, in that circumstance A, not knowing that there was any intention to rob the bank, A, not knowing that a crime was going to be committed, A would not be guilty of robbing the bank.

"Further, though, if B came out of the bank and said, 'I have just robbed it, I have got this sack full of money, let's go', and then B got in A's car and A took off and ran knowing that the crime had been committed, and

helping in the escape, he could be liable."
(R-144).

Upon recital of the above misleading second hypothetical example, counsel objected (R-145). It is respectfully submitted that the last sentence of this example is an incorrect statement of the law, when applied to the crime of burglary. An individual cannot aid and abet in a burglary that is already finished and accomplished. Burglary like rape and arson is completed at the moment of the act in question.

The section of the burglary statute which applies to appellant is D. C. Code 22-1801(b) which reads as follows:

"Except as provided in subsection (a) of this section, whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, whether at the time occupied or not, or any steamboat, canalboat, vessel, or other watercraft, or railroad car or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than two years nor more than fifteen years."

The crucial element of second degree burglary is the specific intent which impelled the entry. United States v. Jefferies, 45 F.R.D. 110 (D.D.C. 1968). Since the elements

of the crime of the example are different from burglary, "A" in the hypothetical example could not have been aiding and abetting. This instruction mislead the jury thereby depriving appellant of his right to a fair trial.

The District of Columbia Code distinguishes between an accessory before or at the fact, who is punishable as a principal, and an accessory after the fact. The relevant sections are as follows:

"§22-105. Persons advising, inciting, or conniving at criminal offense to be charged as principals.

"In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact, the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be."

"§22-106. Accessories after the fact.

"Whoever shall be convicted of being an accessory after the fact to any crime punishable by death shall be punished by imprisonment for not more than twenty years. Whoever shall be convicted of being accessory after the fact to any crime punishable by imprisonment shall be punished by a fine or imprisonment, or both, as the case may be, not more than one-half the maximum fine or imprisonment, or both, to which the principal offender may be subjected."

While section 22-105 does not establish a separate offense, section 22-106 does establish an offense of which

appellant cannot be convicted unless separately charged. Johnson v. United States, 123 F.2d 111 (7th Cir. 1941), rev'd on other grounds, 319 U.S. 503 (1954) (construing 18 U.S.C. §§550 and 551 which are analogous to provisions of 18 U.S.C. §§ 2 and 3⁴). The sentence provided for an accessory after the fact is different from that applicable to one convicted as a principal. It is, therefore, clear that under the District of Columbia Code, there is a distinction between an accessory before or at the fact, who is responsible as a principal,

⁴ The texts of 18 U.S.C. §§2 and 3, as they read in 1943, are as follows:

18 U.S.C. §2:

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal.

. . . ."

18 U.S.C. §3:

"Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

"Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years."

and an accessory after the fact, who is guilty of a separate offense.

The law appears clear that to find a person guilty as an aider or abettor which is under District of Columbia Code either an accessory before or at the fact, it must be shown that he shared in the criminal intent of the principal at the time the offense was committed. Johnson v. United States, 195 F.2d 673, 675 (8th Cir. 1952). Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962); Lucero v. United States, 311 F.2d 457 (10th Cir. 1963) (dissenting opinion).

The facts set forth in the Court's hypothetical example negate the need for the existence of any shared intent on the part of the appellant at the time of the commission of the crime. Furthermore, one who assists in escape of the offender or in the disposal of the stolen property may be an accessory after the fact to the crime of robbery or larceny, but cannot be an aider and abettor because he did not become connected with the felony until after its commission. Lucchesi v. State, 194 A.2d 266 (Md. Ct. App. 1963), cert denied, 376 U.S. 932 (1964).

On the facts stated by the Court in its example, the hypothetical defendant clearly would be guilty only as an accessory after the fact. It was, therefore, clearly erroneous to instruct the jury that such facts would support

a conviction as an aider and abettor.

Since the supplemental instructions were given pursuant to a specific inquiry by the jury (R-140), and since the guilty verdicts were returned within fifteen minutes after the jury received such supplemental instructions, it must be assumed that reliance on the erroneous instruction was an important factor in causing the jury to arrive at a guilty verdict.

V. THERE WAS NOT SUFFICIENT EVIDENCE UPON WHICH A REASONABLE JURY COULD HAVE CONCLUDED BEYOND A REASONABLE DOUBT THAT APPELLANT AIDED AND ABETTED THE COMMISSION OF SECOND DEGREE BURGLARY

The pages of transcript upon which this argument is based are pages 55-106 and 119.

The jury was charged, and the United States Attorney was allowed to argue to the jury, that appellant Maurice Irving could be found guilty as a principal, under D. C. Code §22-105, if they found that appellant had aided or abetted one James Irving and an unnamed party in the commission of burglary and petit larceny. In view of the total failure of proof to establish that Maurice Irving had committed burglary as an actual principal, the only remotely plausible basis upon which the case could have been submitted to the jury, was upon the allegation of petit larceny.

The aiding and abetting statute is not a dragnet catch-all device to be used to shore up loose prosecutions

or shoddy police work or to sweep up and impose criminal liability upon the innocent bystander as well as the participating criminal. The courts have carefully imposed certain necessary evidentiary standards as safeguards against the breadth of such statutes to prevent substantial miscarriages of justice. The failure to meet those standards in the trial below demands reversal and the entry of a judgment of acquittal as to appellant Maurice Irving.

In order to establish the substantive elements of aiding and abetting another in the commission of a crime, it must be shown that the defendant did "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (Citing Learned Hand, J. in United States v. Peoni, 100 F.2d 401, 402 (2nd Cir. 1938)). As Judge Learned Hand cautioned in discussing the historical origin of aiding and abetting, all of the pertinent definitions of the offense: ". . . - carry an implication of purposive attitude towards it [the crime committed]." United States v. Peoni, (Supra).

As the Court of Appeals for the District of Columbia warned in a per curiam opinion by Judges Washington, Burger and Wright; there must be credible evidence that the appellant had guilty knowledge or participation in the crime

if a conviction as an aider and abettor is to be sustained.
Kemp v. United States, 311 F.2d 774 (D. C. Cir. 1962).

In Kemp v. United States (Supra) the District of Columbia Circuit Court of Appeals reversed a jury conviction of aiding and abetting in the unauthorized use of a motor vehicle, where the record showed nothing more than presence at the scene of the crime.

Kemp had been convicted by a jury of violating the statute which forbids any person from using or causing to be used any motor vehicle and causing the same to be operated or driven for his own use. D. C. Code §22-2204. The evidence showed that Kemp had been picked up by a friend who had stolen the car, and that he had gone for a ride in it. Since the continuing use of a stolen car is in violation of the statute, Kemp was charged as an aider and abettor in the commission of unauthorized use.

As the dictum and holding of Kemp (Supra) indicates; the mere presence of an individual at the scene of the crime is not enough, and may not alone serve as a basis for impermissible speculation by the jury as to the tenor and reason for such presence.

In Kemp (Supra) the Court in ruling on an aider and abettor under the unauthorized use statute found that:

"...the car lights were not turned on,
that Gray made an illegal turn, that he

had neither permission from the owner nor license from the state to drive, that he had stolen tires in the back seat, are all matters as to which guilty knowledge on appellant's part must be established, if they are to be deemed evidence against him." (Emphasis added). 311 F.2d at 774, 775.

Accordingly, the verdict and judgment of the District Court were set aside and a judgment of acquittal nonobstante veredicto was entered by the Appellate Court.

Such acts standing alone without a showing of guilty knowledge do not identify appellant with guilty use or knowledge. Jones v. United States, 404 F.2d 212 (D. C. Cir. 1968).

In the case at bar appellant was shown only to have exited onto a highway (R-84), raced away from a police car (R-85), had no license from the District of Columbia to drive (R-118), and a television and blanket in the back seat. (R-89).

In the case at bar, the evidence of record shows only that appellant was involved in a fact situation that is akin to Kemp, and found to be present near the scene of the crime. There is no evidence to show that appellant aided and abetted in the alleged burglary at all.

VI. REVERSIBLE ERROR WAS COMMITTED BY
RECEIPT INTO EVIDENCE OF AN INVENTORY
RECORD WHICH WAS UNDATED, UNSIGNED
AND FOR WHICH NO FOUNDATION FOR
ADMISSION HAD BEEN ESTABLISHED

The pages of transcript upon which this argument is based are pages 55-67 and 77-82.

The trial court erred in admitting an inventory record into evidence to show that a particular television set was in a given room or area at the time of the alleged crime.

During the course of the trial, Mr. Lesko, the manager of the Holiday Inn Hotel for only nine days was asked if the Holiday Inn Hotel, 2700 New York Avenue, kept a record of the television sets in each room and he indicated that the Holiday Inn Hotel kept such a record (R-57). Mr. Lesko identified a record which was marked as Government's Exhibit No. 1, which he said showed the numbers of the rooms and immediately next to the numbers of the rooms was a serial number of the television set assigned to that room (R-58). In relation to the record, Mr. Lesko testified on direct examination that:

Q: "To your knowledge, are those records accurately kept, sir?"

A: Yes, sir.

Q: Are they kept in the ordinary course of the business of the Holiday Inn?

A: Yes, sir." (R-58).

On cross-examination, Mr. Lesko testified that he did not prepare the record in question himself (R-61) and that he did not know by his own personal knowledge what television set, as identified by its serial number, was in the hotel room (R-63).

It is specifically noted that Mr. Lesko had been an employee of the Holiday Inn Hotel, at 2700 New York Avenue, for nine days (R-61). Mr. Lesko further stated that other persons had access to the room from the time he last inspected it (R-65), and that he did not know whether the door to Room 166, the room from which a television set was allegedly taken, was locked or left with the door unlocked (R-67).

Under cross-examination, Mr. Lesko testified to the particulars of the record when he stated:

Q: "Was the record made up before or after you became manager of the hotel?"

A: It was made up before. It was in the office when I took over the facility.

Q: And you do not know of your own knowledge when that record was made?

A: No, sir I do not." (R-78).

The record was then admitted into evidence over objection of counsel (R-81).

There is no showing in the record that the inventory record concerning location of the television sets was prepared by a person authorized to make such a record, that

it was made on the basis of the personal knowledge of the person preparing it, that it was made a reasonable time after the event, or that it represented or was made pursuant to establishing business procedures for the systematic or routine making and preserving of company records. In short, there is no evidence on the record to qualify the inventory record as a business record under the Federal Shop Book Rule.

In Ace Freight Forwarding Co. v. Baltimore & Ohio R. Co., 202 A.2d 649 (D.C. Ct. App. 1964), the court did not allow the admission of inventory records into evidence. As the court stated:

" . . . The inventories here were not business entries, they were not compiled by some officer or employee of Ace in the course of his regular employment; nor were they prepared by an entrant who had personal knowledge of the value of and damage to the goods. Testimony developed from these reports would be based upon hearsay as they clearly do not meet the tests of admissibility under any exception to the hearsay rule." 202 A.2d at 651.

The testimony in the present case does not show that the inventory record was compiled by a partner or employee of the Holiday Inn Hotel in the course of his regular employment.

In New York Life Ins. Co. v. Taylor, 147 F.2d 297 (D. C. Cir. 1944), the court found that the Supreme Court in Palmer v. Hoffman, 318 U.S. 109 (1943) limited the Shop Book Rule to:

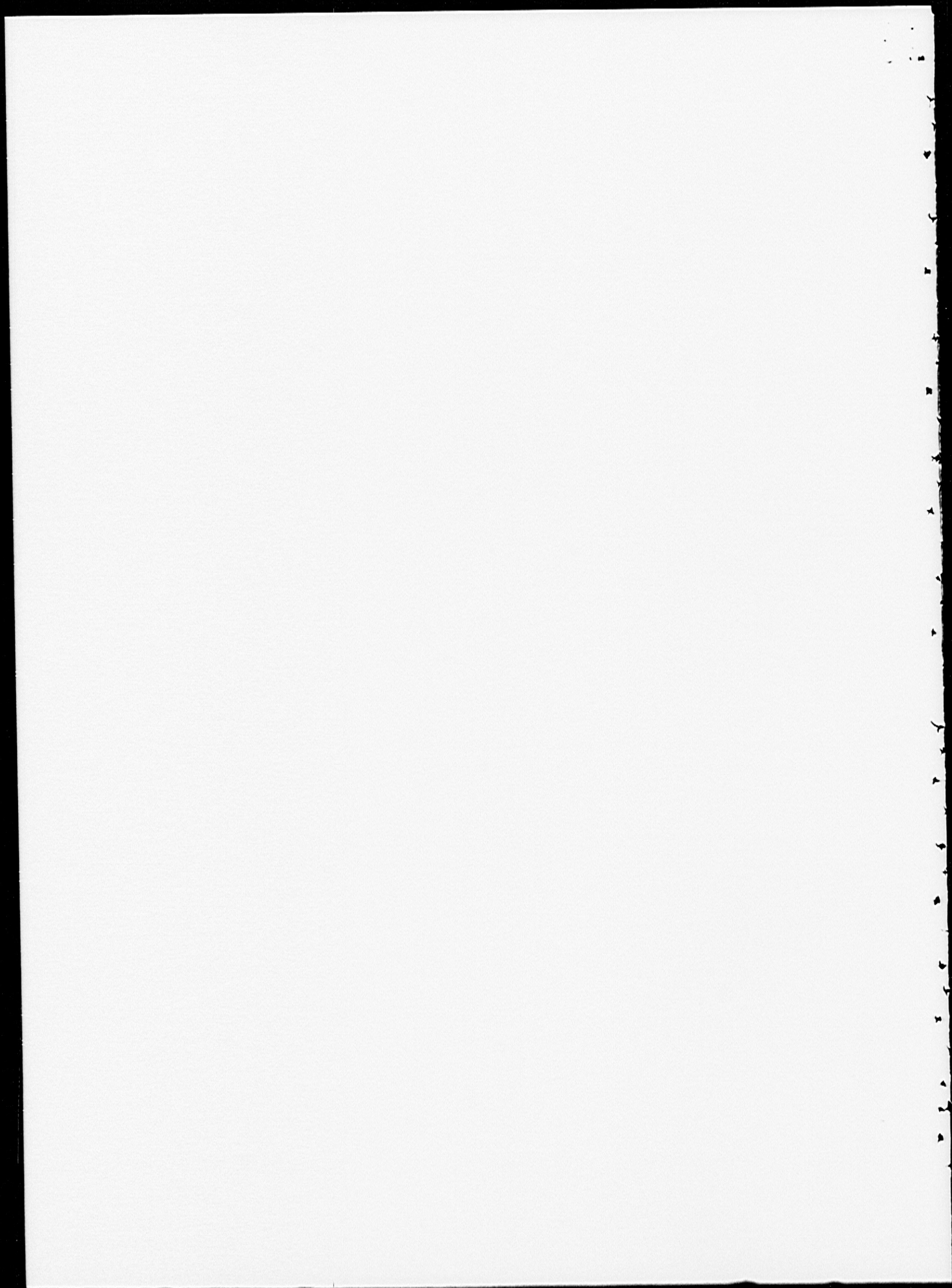
"...the admission of records under the Federal Shop Book Rule statute to those which are trustworthy because they represent the routine reflections of day-to-day operations. The opinion, in that case holds that the statute is not one 'which opens wide the door to avoidance of cross-examination'." 147 F.2d at 300.

Since no proper foundation for admission had been established for the record as required by the Federal Shop Book Rule, 28 U.S.C. §1732, the admission of such evidence by the court was erroneous. Standard Oil v. Moore, 251 F.2d 188 (9th Cir. 1957), and Donaldson Pub. Co. v. Bregman, 253 F.Supp. 841 (S.D. N.Y. 1965).

And even if one assumes arguendo that the testimony provides a proper foundation for the Federal Shop Book Rule, and thus allows the introduction of the list of television numbers into evidence, the court should have specifically cautioned that it was for the purpose of showing that the television set having the given number was owned by the hotel and belong somewhere on or about its premises as distinguished from showing that the television set was in a given room at a given time. The testimony discloses that the television sets were switched from place to place from time to time (R-63). Thus even if the list was admissible for the purpose of showing a larceny it could not be admissible for showing a burglary in room 166, of the Holiday Inn Hotel.

CONCLUSION

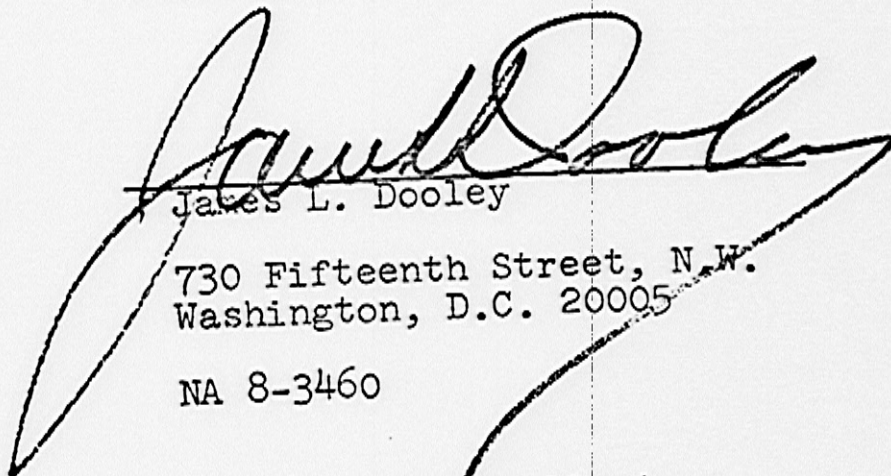
The judgment below cannot stand and it is, therefore, requested that the decision below be reversed and the judgment



vacated.

Appellant should be given any further relief deemed proper.

Respectfully submitted,



James L. Dooley
730 Fifteenth Street, N.W.
Washington, D.C. 20005
NA 8-3460

Counsel for Appellant
(Appointed by this Court)

Of Counsel:

John S. Hale
730 Fifteenth Street, N.W.
Washington, D.C. 20005

November 14, 1969



APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,096

UNITED STATES OF AMERICA
Appellee

v.

MAURICE F. IRVING
Appellant

Appeal from a Judgment of the United States
District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 2 1970

Nathan J. Paulson
CLERK

James L. Dooley
730 15th Street, N.W.
Washington, D.C. 20005

Of Counsel:

John S. Hale

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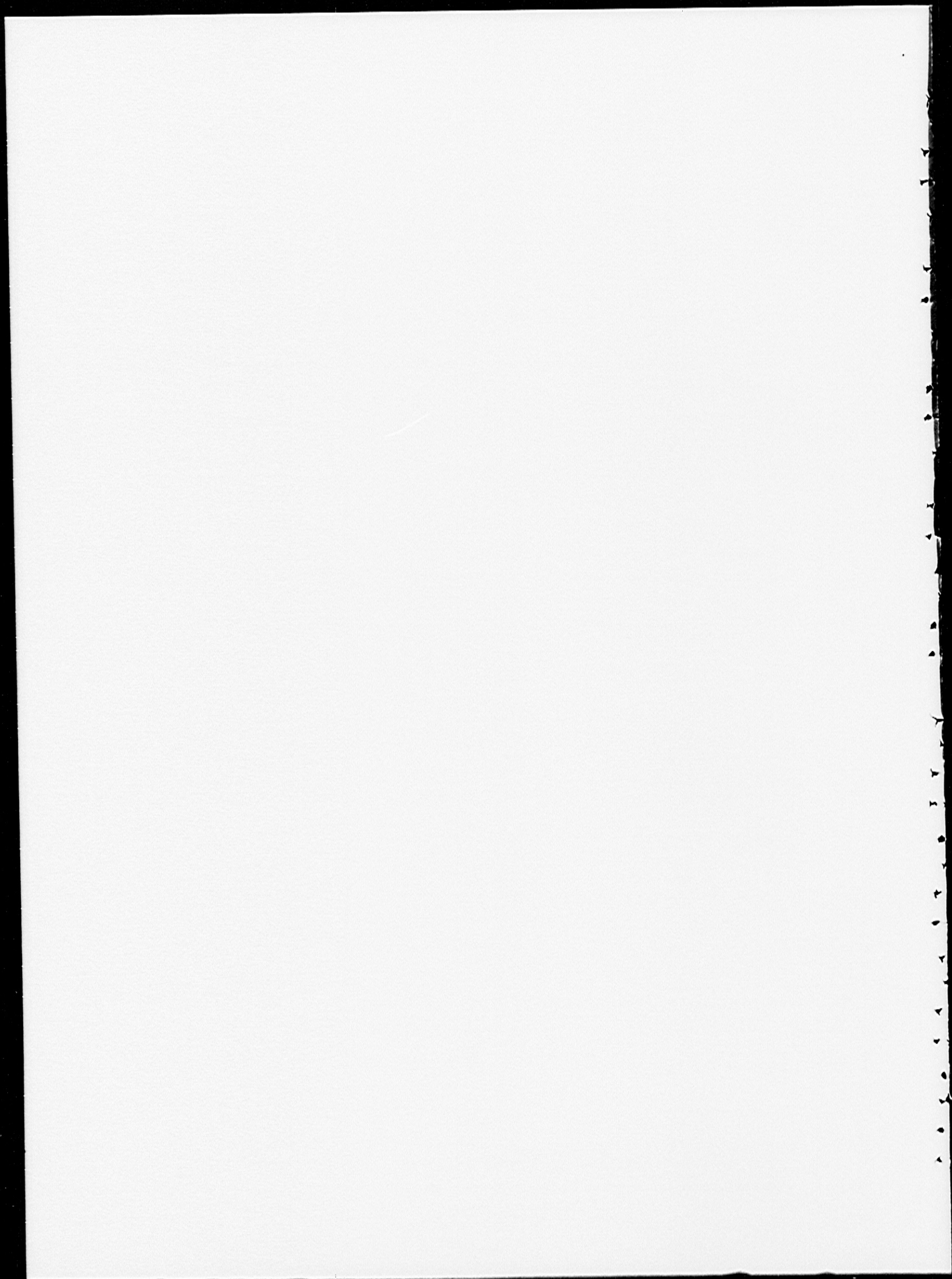


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* Cases chiefly relied upon are marked by asterisks.



IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,096

UNITED STATES OF AMERICA
Appellee

v.

MAURICE F. IRVING
Appellant

Appeal from a Judgment of the United States
District Court for the District of Columbia

APPELLANT'S REPLY BRIEF

Appellee's "Counterstatement of the Case" contains several incomplete statements of fact which are prejudicial to Appellant. It should be noted that when Officer Dotson jumped out and approached the stalled car; Appellant, Maurice Irving, was behind the wheel in the car and the door was closed. Officer Dotson told Appellant to get out of the car and after Appellant, Maurice Irving, got out he made no attempt to run away. (R-102). The other individuals in the car either tried to exit from the car (R-103) or ran away (R-86). After arresting Appellant and the remaining individual, Officer Dotson came up to the car,

looked in the car and saw a television set and a gold blanket which were sitting on the right floorboard in the back of the car. (R-88, 89).

ARGUMENT

I. THE PROSECUTOR COMMITTED ERROR
IN HIS CLOSING ARGUMENT WHEN
HE REPEATEDLY STATED THE
TESTIMONY WAS "UNCONTRADICTED".

Appellee's authorities,¹ page 3 of the Brief, are easily distinguished from the present case. None of these cases had the benefit of the decision of the Supreme Court in Griffin v. California, 380 U.S. 609 (1965). None of the cited cases have more than a singular prosecutor's comment towards the defendant's failure to testify. Only the World War I era cases of Bradley v. United States (supra) and Carlisle v. United States (supra), use the terminology "uncontradicted". The terminology in Carlisle (1912) is in substance a summary by the court of the argument of the District Attorney; and Bradley (1918) approved

¹ Jordan v. United States, 324 F.2d 178 (5th Cir. 1963); Bary v. United States, 248 F.2d 201 (10th Cir. 1957); Baker v. United States, 115 F.2d 533 (8th Cir.), cert. denied 312 U.S. 692 (1940); Rinella v. United States, 60 F.2d 216 (7th Cir. 1932); Bradley v. United States, 254 F.2d 289 (8th Cir. 1918); Carlisle v. United States, 194 F.2d 827 (4th Cir. 1912); See Annot. 14 A.L.R. 3rd 763 § 110 (1967).

the following nonsensical argument to be made to the jury by an attorney for the United States:

"The evidence against said defendants was conclusive and convincing of their guilt, and the said evidence had not been contradicted or denied, thereby calling to the attention of the jury the fact that said defendants had not taken the stand to testify in their behalf."
254 Fed. at 291.

The inapplicability of Appellee's primary case, Bary v. United States (supra) to the case at bar can best be set forth by citing the relevant parts of the court's decision. The case arose on a prosecution for conspiracy to organize the Communist Party as a group advocating the overthrow of the government by force and violence. In commenting on the contention that the closing argument to the jury amounted to reference of Appellant's failure to testify on his own behalf, Chief Judge Bratton stated:

"Complaint is made respecting the closing argument of the United States Attorney to the jury. The contention is * * * that portions amounted to references by inuendo to the failure of appellants to testify in their own behalf. * * * No express reference

was made in the argument of the United States Attorney to the failure of appellants to testify on their own behalf." (Emphasis added). 248 F.2d at 213.

Appellee contends that Appellant could have adequately protected himself against the prosecutor's repetitive unconstitutional comment on his failure to testify. Appellee contends that through hindsight or clairvoyancy, defendant should have brought forth pedestrians, motorists, hotel guests, hotel employees, and any other individual or group of individuals that defendant may have contacted on August 24, 1968, to rebut a constitutional violation that would occur in the future.

Appellee states that, since defendant did not object at trial, he must now show that the statements constituted plain error. As was stated in the original brief, to require an objection at this point in the trial would put the defense in the untenable position of making a judgment of whether greater harm would come to the Appellant from interrupting the prosecutor's argument to the jury and thereby focusing their attention to the fact that Appellant did not testify or to remain silent and let

such a prejudicial argument pass, hoping that the damage done would be minimal. Counsel is required by the government at this crucial moment to be placed in a position where he must flip a mental coin which will end up in a heads they win or tails we lose position. A prosecutor should never be allowed to force a defendant to impale himself on one horn or the other of the imposed dilemma. Garris v. United States, 390 F.2d 862 (D.C. Cir. 1968).

In White v. United States, 314 F.2d 243 (D. C. Cir. 1952), the defendant did not take the stand during the trial. The prosecutor pointed out that the government's only exhibit was a television set which was recovered pursuant to the defendant's directions, and stated:

"The Government would also bring to your attention the fact that the defendant failed to take the stand. No inference at all is to be given to you by the fact (sic) that he exercised this right. This is a very important right to the individual; it is an important right in our system of justice. 'It is my job to prove to you --'". (Emphasis added by the court) 314 F.2d at 245.

At this point the defense counsel interrupted and asked for a bench conference and subsequently moved for

a mistrial on the basis of the prosecutor's comment. The motion for mistrial was denied. The court found that this was error stating:

"Even if the judge had then admonished the prosecutor and had promptly instructed the jury on the point, we would have had a close question. At least in those circumstances the jurors might have tried to eliminate from their thinking any possible inference of guilt from the appellant's failure to refute or explain his admissions or otherwise to counter what had been offered against him. * * * Here the judge did neither. He made no reference to the challenged episode in his charge. Although, later he correctly instructed the jury 'that no inference of guilt arises against the defendant because of his failure to testify as a witness in his own behalf' and properly explained the rationale of the rule, we are not persuaded that no prejudice arose." (Emphasis added) 314 F.2d at 245.

The court went on to say how much prejudice may be attributable to an occurrence of this sort, they had no way of knowing and went on to cite from a Supreme Court case:

"The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to

it." 314 F.2d at 246.

The court further noted:

"Strict observance [of this principle] has been many times commended to prosecuting attorneys." (Emphasis added) 314 F.2d at 246;

and complemented this notation by citing in part from Stewart v. United States, 366 U.S. 1, 291 Sup.Ct. 941, 6 L.Ed.2d. 84 (1961), as follows:

"Ordinarily, the effectuation of this protection is a relatively simple matter — if the defendant chooses not to take the stand, no comment or argument about his failure to testify is permitted." (Emphasis added by the Court).

The last paragraph of the decision is as follows:

"We have carefully considered all aspects of the case in our effort to determine whether or not there was harmless error. Fed. R. Crim. P. 52(a) reads: 'Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.' But it is beyond doubt that an accused is afforded a 'substantial right' in deciding whether or not to take the stand. We find ourselves unable to say with fair assurance and in the total setting here presented, that there was no prejudice." (Emphasis added).

II. THE MODIFIED ALLEN CHARGE WAS IMPROPER

As was noted in Jenkins v. United States, 330 F.2d 220 (D.C. Cir. 1964) rev. 389 U.S. 444, 85 Sup.Ct. 1059, 13 L.Ed. 957 (1965), Judge Wright stated that the words "if you can conscientiously do so" were crucial. In fact, Appellee's primary case of Fulwood v. United States, 369 F.2d 960 (D.C. Cir. 1966) cert. denied 387 U.S. 934, 87 Sup.Ct. 2058, 18 L.Ed.2d 996 (1967), found that the variations from the "Allen charge" which are set forth in Appellee's Brief, page 6, were not coercive because of the redeeming feature "only if it could conscientiously do so". The court after discussing the "Allen charge" modifications set forth in Appellee's Brief, set forth the rationale for its decision stating:

"In United States v. Gordon, supra, a similar statement was found not to be error, since the judge 'expressly explained that it was the jury's duty to decide the case, only if it could conscientiously do so.' 196 F.2d at 891-892, the same explanation was made in the instant case." (Emphasis added). See United States v. Gordon, 196 F.2d 886 (7th Cir. 1952).

The court went on to note that District judges should use a form of instruction plainly within Allen which

is of course opposite to the case at bar.

We agree with the Appellee that the Allen charge is coercive and that modified versions can be less coercive than the original Allen charge. However, as can be seen, by Fulwood (supra), Gordon (supra) and Jenkins (supra), the crucial aspect of the Allen charge which must be given if the charge is to be upheld is the "conscientiously do so" section. See also Thaggard v. United States, 354 F.2d 735 (5th Cir. 1965) cert. denied 383 U.S. 958, 16 L.Ed. 2d. 301, 86 Sup.Ct. 1222 (1966), another case cited by Appellee, where Chief Judge Tuttle stated:

"This court, although sometimes reluctantly, has approved the 'Allen Charge', while carefully assuring ourselves that there are not engrafted upon it any partial or onesided comments. * * * Such a charge, so long as it makes plain to the jury that each member of the jury has a duty conscientiously to adhere to his own honest opinion and avoid creating the impression that there is anything improper, questionable, or contrary to good conscience for a juror to cause a mistrial, * * * is still a permissible charge to be given in proper circumstances in this circuit."
(Emphasis added).

III. THE ALLEN CHARGE IN ANY FORM IS ERRONEOUS

We agree with Appellee that the traditional Allen charge is coercive and with the many commentators which make the same assertion. Appellant contends that giving the Allen charge which is coercive in any form is erroneous. As Judge Coleman stated in a concurring opinion in Thaggard (supra), a case relied on by Appellee:

"I entertain the thought that if it [the Allen charge] were submitted to the Supreme Court today the result might not be the same as it was in 1896. I cannot see that the qualifications, reservations, and escape clauses customarily used in modern versions of the charge save it from being what it is, and what the jury believes it to be, a direct appeal from the bench for a verdict."
(Emphasis added) 345 F.2d at 739,740.

However, it should be specifically noted that the circuits cited by Appellee have not upheld the validity of the Allen charge in all aspects. Indeed Allen v. United States, 164 U.S. 492 (1896), the case from which the "Allen charge" originated can be said to be authority for the proposition that the charge is only valid for deadlocked juries. As stated in Green v. United States, 309 F.2d 852 (5th Cir. 1952):

"The Allen or 'dynamite' charge is designed to blast loose a deadlocked jury. There is small if any, justification for its use. Nevertheless, an old decision of the Supreme Court has upheld the charge as a reminder to jurors that 'they should listen, with a disposition to be convinced, to each other's argument.' Allen v. United States, 1896, 164 U.S. 492, 17 Sup.Ct. 154, 41 L.Ed. 528. This is the outermost limit of its permissible use." (Emphasis added). 309 F.2d at 854.

In Green (supra) the court agreed with the views expressed by Judge Brown who dissented in Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962), stating in part that:

"I think a mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment. Nothing should interfere with its exercise. In the final analysis the Allen charge itself does not make sense. All it may rightfully say is that there is a duty to consider the views of others but that a conscientious person has finally the right and duty to stand by conscience. If it says that and nothing more it is a superfluous lecture in citizenship. If it says more to declare that there is a duty to decide, it is legally incorrect as an interference with that rightful

independence.

"The time has come, I think, to forbid this practice. Like the silver platter, this is too dear to keep. The cost in fundamental fairness is too great." (Emphasis added by the court). 309 F.2d at 854.

As previously stated by Appellant, the common law judicial system utilizing the juror concept is based upon a meeting of individual minds to reach a decision which can take the form of a mistrial, not guilty or guilty verdict. The "Allen charge" takes away one of these decision prerogatives by making it psychologically difficult if not impossible for a juror to maintain his opinion in the face of an opposing majority.

IV. THE TRIAL COURT'S INSTRUCTION ON AIDING AND ABETTING WAS PREJUDICIAL AND THERE WAS NOT ENOUGH EVIDENCE TO CONVICT APPELLANT OF SECOND DEGREE BURGLARY.

The trial court committed reversible error in giving a misleading instruction to the jury on aiding and abetting in relation to burglary, which when combined with the jury's supplemental request to clarify aiding and abetting as far as burglary is concerned, prejudiced Appellant.

There must be credible evidence that the Appellant had guilty knowledge or participation in the crime to sustain a conviction as an aider and abettor. Kemp v. United States, 311 F.2d 774 (D.C. Cir. 1962).

As the dictum holding of Kemp (supra) indicates the presence of an individual at the scene of the crime is not enough and may not alone serve as a basis for impermissible speculation by the jury as to the tenor and reason for such presence.

In Bailey v. United States, 416 F.2d 1110 (D. C. Cir. 1969), cited by Appellee, the court found that the evidence was legally insufficient to enable a jury to conclude beyond a reasonable doubt that the defendant participated in the commission of the offense. The defendant's conduct amounted to presence at the scene of the crime. As the court stated:

"In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about,

that he seek by his action
to make it a success.'" 416
F.2d at 1113.

As the case states, an inference of criminal participation cannot be drawn merely from presence; as a culpable purpose is essential. The court in Bailey (supra) held that the government's evidence left too much room for the jury to engage in speculation, in that the totality of the evidence could only conjecturally support a finding that the Appellant "associated himself with the venture, that he participated in it as something he wished to bring about, and that he sought by his action to make it succeed."

In the case at bar, the government has only proved that Appellant was leaving the scene in question, committed a traffic violation, fled from a policeman and that a car driven by Appellant contained property which may have been stolen²; the property having been initially sighted between the legs of another individual sitting in the

² As will be demonstrated in the next Section, there is nothing here that will really show whether the alleged theft occurred from a TV repair truck, from a stoop in front of the room -- or from the room itself.

backseat of the car.

In Hendricks v. United States, 327 F.2d 971 (5th Cir. 1964), Chief Judge Tuttle held that the evidence was insufficient to permit submission of the issue of the defendant's guilt to the jury. As the court stated:

"We can find no evidence in the record that could properly permit the submission of the issue of guilt or innocence of the appellant, Torbert, to the jury in the absence of any testimony connecting her with the cashing of one or more of the forged checks. Her presence when Shelton delivered the blank checks, typewriter and the identification cards to Hendricks and her presence in the car on the trip from Mobile to Pascagoula might well show knowledge by her that a criminal undertaking was afoot. But these facts do not show that she was a participant, either, a principal or as an aider or abettor, Nye & Nissen v. United States, 336 U.S. 613, 69 S.Ct. 766, 93 L.Ed. 919; United States v. Garguilo, 2nd. Cir., 310 F.2d 249." 327 F.2d at 974.

The only evidence which the government can properly submit on issue of guilt or innocence of the Appellant is that his presence as driver might show knowledge that a criminal undertaking was underfoot. The

evidence does not show that Appellant was a participant either as a principal or an aider or abettor in the charge of burglary.

V. THE TRIAL COURT SHOULD NOT
HAVE ADMITTED INTO EVIDENCE
GOVERNMENT EXHIBIT NO. 1

In this case, the length of time between the preparation of the alleged inventory document and the time when the alleged burglary was to have occurred, was sufficient to raise an inherent probability of untrustworthiness. In a criminal case the Federal Shopbook Rule for the admission of evidence should be strictly applied. Thus the time factor which was involved in this case between the time of the alleged action and the time that said alleged inventory document was made is sufficient to place the document's trustworthiness in grave doubt.

Leroy v. Subrena Delta Airlines, 344 F.2d 266 (2nd. Cir. 1965), cited by Appellee, was a civil court action in which the document in question was a radio transcript concerning an airplane crash which was the subject of the civil action. The timeliness of this document with respect to the occurrence of the action, the civil nature of the proceedings and the fact that it was in the regular course of business to make such a memorandum, differentiates this

case from the case at bar.

The Government's Exhibit No. 1 shows only that the television set belonged to the Holiday Inn Hotel. There is no evidence to show that there was a breaking or an entering. Furthermore the manager of the Holiday Inn testified that the television sets in the hotel were shuffled back and forth and were replaced and interchanged. (R-63). The manager also stated that the older a television set was the more trouble the hotel had with it. (R-77). Thus there is no evidence other than Exhibit No. 1 to show that the television set was physically in the room from which it was allegedly taken.

While the Government's Exhibit No. 1 may be admissible for the limited purpose of showing a larceny it should not be admissible for the showing of a burglary in Room 166 of the Holiday Inn Hotel.

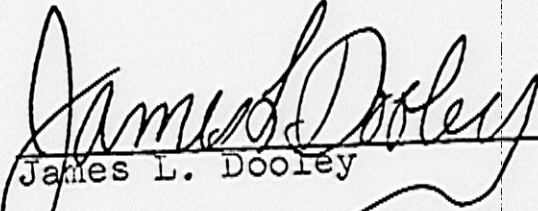
CONCLUSION

The present conviction should be set aside based on the law and failure of proof by the Government.

It is therefore respectfully requested that the conviction be vacated or set aside and that the lower court be directed to enter a judgment of acquittal and grant all other relief necessary and proper.



Respectfully submitted,


James L. Dooley
730 15th Street, N.W.
Washington, D.C. 20005
Tel. Na8-3460

Counsel for Appellant
(Appointed by this Court)

Of Counsel:

John S. Hale
730 15th Street, N.W.
Washington, D.C. 20005

March 2, 1970

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA

v.

MAURICE F. IRVING,

Appellant

No. 23,096
(Cr. No. 1661-68)

PETITION FOR REHEARING

FILED JUN 29 1970

Nathan J. Paulson
Now comes appellant, through appointed counsel,
under F.R.A.P. 40, and petitions for rehearing.

In pressing for this rehearing the appellant hereby wishes to restrict himself to the single point which was topically raised in Judge Wilkey's concurring opinion, to wit the effect of the erroneous instruction by the trial court on the charge of aiding and abetting.

Judge Wilkey's opinion makes it crystal clear that Judge Hart's second instruction on aiding and abetting was erroneous. As a matter of law that point is now beyond debate. The question remaining for debate is whether this court can now say "with fair assurance" that the judgment of the jury was not "substantially swayed by the error." Kotteakos v United States, 328 U.S. 750, 765, 90 Law. Ed. 1557, 1566 (1946).

We respectfully submit that we can, at rehearing, demonstrate that there are no such assurances. Indeed, we believe we can show, at rehearing, that the record as a whole creates a presumption at law that the defendant was prejudiced.

There is, and can be, no dispute as to what happened. During the main charge to the jury, and starting at the bottom of Page 129 and continuing to the bottom of Page 130, Judge Hart gave a technically correct broad instruction on the general definition of aiding and abetting. After a few other instructions, the jury retired.

Two and one-half hours later the jury presented the Court with a note reading:

"Could I have a clarification of the aiding and abetting as far as burglary is concerned".
(Tr 140).

Judge Hart then repeated—word for word—the very same (technically correct) generalized aiding and abetting instruction (Tr 141-142) which had failed to illuminate the jury—indeed which had left the jury demonstrably confused and fraught with uncertainty in the first instance. He then followed that charge with an example, wherein the principal would plainly be guilty of the crime of aiding and abetting a bank robbery. (Tr. 142).

Counsel then asked for an example wherein the principal would not be guilty of aiding and abetting (Tr 143), whereupon the Court gave the erroneous instruction contained in Judge Wilkey's opinion (Tr 144).

This erroneous instruction was the very last words uttered to the jury (other than a perfunctory "You may retire and resume your deliberations") (Tr 145).

In less than fifteen minutes the jury—with that erroneous instruction still ringing in their ears—had resumed—redeliberated—and found the defendant guilty.

In the only articulated opinion of this court, Judge Wilkey found there was no substantial prejudice in this sequence because the erroneous instruction had been preceded by technically correct instructions on aiding and abetting.

This conclusion is error and the Supreme Court has so held.

In Bollenbach v. United States of America, 326 U.S. 607, 90 Law. Ed. 350 (1946) the Court held:

"Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge." (at 612, at 354) (Emphasis added)

In Bollenbach, as here, the judge had originally given technically correct instructions and, upon finding the

jury confused as to the meaning of those instructions and how they should be applied to the case, answered explicit questions of the jury with an erroneous instruction.

Under these circumstances, in Bollenbach the court emphasized that:

"When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. In any event, therefore, the trial judge had no business to be 'quite cursory' in the circumstances in which the jury here asked for supplemental instruction. But he was not even 'cursorily' accurate. He was simply wrong." (at 612, at 354.)

In Bollenbach, as here, the erroneous instruction was followed—in a matter of minutes—by a redeliberation and return to the courtroom with a verdict of guilty.

In Bollenbach, the court noted that the jury

"...reached a verdict of guilty under the conspiracy count five minutes after their inquiry was answered by an untenable legal proposition. It would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide". (at 614, at 355). (Emphasis added).

At rehearing we will demonstrate that this court took precisely that same long jump.

There is one final analogy between the situation presented in Bollenbach and the facts of the instant case. In Bollenbach the Court of Appeals, in approving the instructions in issue, had fallen into total confusion about

the possibility of defendant's aiding and abetting on one hand, and being an accessory after the fact on the other.

When an experienced Court of Appeals can, and sometimes does, get this distinction confused, who can say that the jury had it straight—particularly when the judge had told them flat out that facts amounting to being an accessory after the fact serve as a basis for conviction of aiding and abetting. To approve this theory is to adopt the notion advanced by the Government, and rejected by the Court, in Bollenbach:

"The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. (at 613,614, at 355).

At rehearing we would argue that no one can state with assurance that the defendant was not unwittingly convicted—by a jury misinformed as to the law—of being an accessory after the fact.

Viewing the Government's evidence in its most favorable light, the record presented a probable basis for such a conviction.

But the defendant was never indicted on such a charge, and he cannot be properly convicted of that offence

in this case. It must be remembered that viewing the Government's case in its most favorable light the defendant was in possession of (had in his car) goods that were recently stolen—perhaps through commission of a burglary. But did the jury find

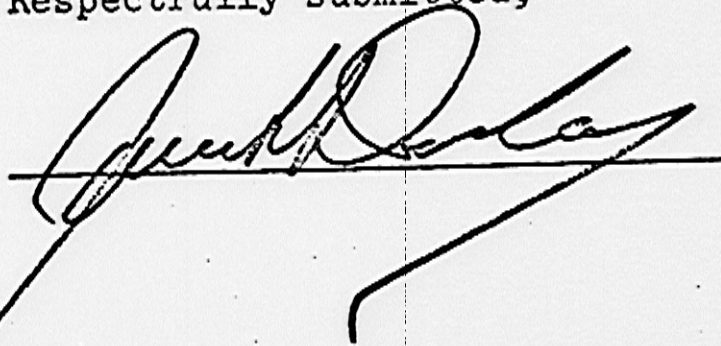
1. That he committed that burglary and larceny, or
2. That he aided and abetted that burglary and larceny, or
3. That he was an accessory after the fact to such burglary and larceny?

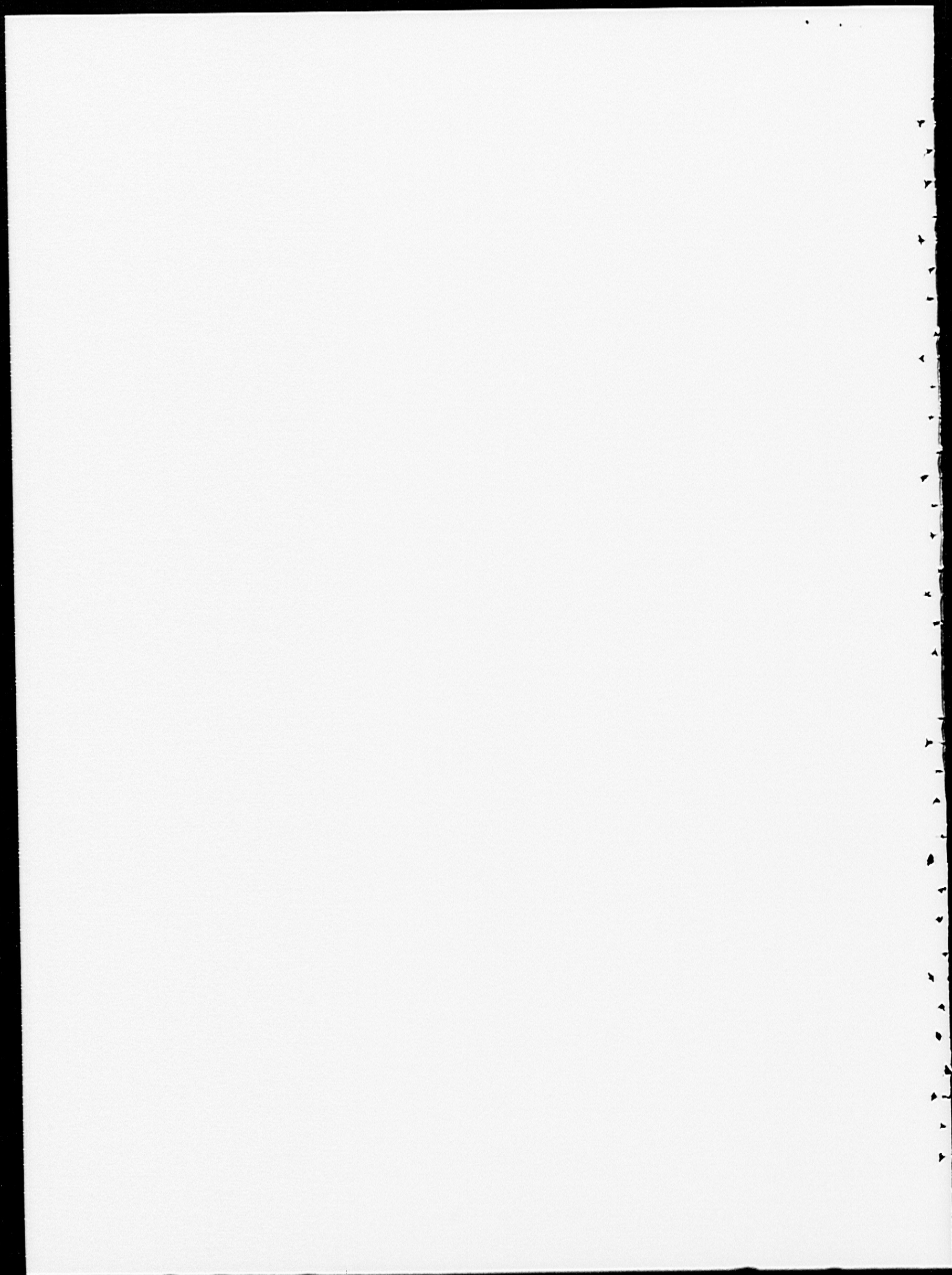
There being no direct evidence that he was a principal (in the real—as distinguished from legal—sense of the word), it is thus apparent that the jury concluded he was guilty under No. 2 or No. 3. But which one? If he was really found guilty of No. 2, then of course the defendant was not prejudiced.

But who can say that he was not convicted of No. 3? The judge had told them that No. 2 and No. 3 were one and the same, and that they could convict on either theory.

No one can say what really happened. That uncertainty as to whether the defendant was prejudiced is more than enough to require reversal.

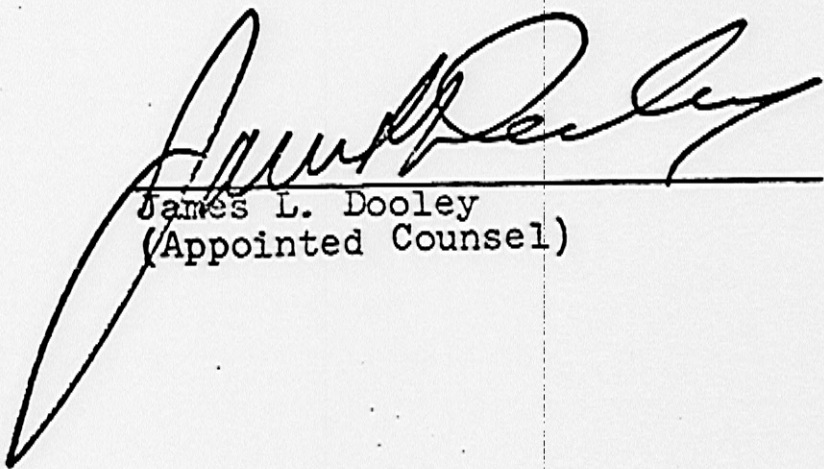
Respectfully submitted,





CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on the United States by delivering a copy thereof to the Office of the United States Attorney, United States Courthouse, Washington, D. C. 20001, on this 29th day of June, 1970.



James L. Dooley
(Appointed Counsel)